



Comptroller General
of the United States

Washington, D.C. 20548

Jones
144821

Decision

Matter of: Atrium Medical Corporation--Reconsideration

File: B-243408.2

Date: September 16, 1991

William A. Scofield, Jr., Esq., Lahive & Cockfield, for the protester.

William R. Mulford for Deknatel Division, Pfizer Hospital Products Group, Inc., an interested party.

Christine F. Bednarz, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration of prior decision sustaining protest is denied where party requesting reconsideration merely repeats arguments made and provides evidence that was available during the initial consideration of the protest, but which was not, though it could have been, presented at that time.

DECISION

Atrium Medical Corporation requests reconsideration of our decision in Deknatel Div., Pfizer Hosp. Prod. Group, Inc., B-243408, July 29, 1991, 70 Comp. Gen. ___, 91-2 CPD ¶ ___, in which we sustained Deknatel's protest against the award of a contract for pleural cavity drainage devices to Atrium under request for proposals (RFP) No. DLA120-91-R-1215, issued by the Defense Logistics Agency (DLA). We sustained Deknatel's protest because the RFP issued to the protester, which specified a particular Deknatel model without indicating that the agency would accept equal products, misled and prejudiced the protester, who assertedly could have proposed a less expensive model conforming to the agency's needs.

We deny the request for reconsideration.

In its reconsideration request, Atrium disagrees that Deknatel could reasonably construe the RFP it received to require offers for the designated Deknatel brand name product as opposed to offers for "equal" products. Atrium essentially repeats arguments it previously made, which we considered and rejected during our initial consideration of the protest.

Atrium also challenges our finding of prejudice by now presenting evidence that Deknatel has sold the specified brand name product at prices equal to, or less than, its alternate products.^{1/} In connection with this factual argument, Atrium also argues that an allegation of prejudice, without more, is not evidence from which our Office can find prejudice.^{2/}

To obtain reconsideration, a requesting party must identify either factual or legal errors in our prior decision or must present information not previously considered that warrant reversal or modification. 4 C.F.R. § 21.12(a) (1991). The repetition of arguments presented for our initial consideration and mere disagreement with our decision do not meet this standard. R.E. Scherrer, Inc.--Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274.

Since Atrium only now raises its factual and legal rebuttal to Deknatel's allegation of prejudice, we cannot characterize these arguments as "information not previously considered," so as to justify reconsideration. We have held that, for the purposes of a reconsideration request, information not previously considered means information that was unavailable when the initial protest was filed. Solarwest Elec.--Recon., B-207573.3, Apr. 13, 1983, 83-1 CPD ¶ 390; Space Age Eng'g, Inc.--Recon., B-205594.3, Sept. 24, 1982, 82-2 CPD ¶ 269. Interested parties who withhold or fail to submit all relevant evidence to our Office, expecting that the contracting agency will advance their precise position or that we will draw inferences favorable to them, do so at their own risk. Id.


1/ These documents include Deknatel retail price lists from May 1989 and May 1990, as well as quarterly audit reports issued by an independent market research firm, detailing hospital purchases in the United States in 1990.

2/ In our view, the cases cited by Atrium do not preclude consideration of a protester's assertions as evidence of prejudice. For example, in Cryomed, B-241605, Feb. 22, 1991, 91-1 CPD ¶ 202, the protester failed to demonstrate prejudice because, "Cryomed has not asserted, and the record does not otherwise indicate, that it would have altered its proposal of its own brand name item had it been notified of the relaxation of the salient characteristics." (Emphasis added.) Deknatel, in contrast, both asserted that it would have altered its proposal of the brand name product had it known the agency would accept equal products and offered evidence of its pricing in a prior procurement to support this allegation.

As an interested party, Atrium received copies of all Deknatel's and DLA's submissions to our Office and thus knew the specifics of Deknatel's protest. Atrium nonetheless did not respond to Deknatel's specific assertion that it could have offered less expensive products, even though Atrium's proposed evidence was then available and Atrium had the opportunity to respond to Deknatel's comments.^{3/} 4 C.F.R. § 21.3(1). It is not our function to prepare defenses to allegations clearly raised; rather, we base our decisions on the record before us. B&M Marine Repairs, Inc.--Recon., B-202966.2, Feb. 16, 1982, 82-1 CPD ¶ 131. Thus, we decline to reconsider our decision on this basis.

Last, in the event we deny its reconsideration request, Atrium asks that we withdraw our recommendation that the agency amend the solicitation to reflect its minimum requirements and obtain revised offers. Atrium argues that it has performed the contract to an extent that resolicitation and possible termination of its contract would not be in the government's best interest. We considered this claim as raised in Atrium's interested party comments on the protest, in which it advised that "an extraordinarily large amount of finished product, material, labor, and warehousing costs [were] invested in the 'award.'" The contracting agency has not substantiated Atrium's claim, either here or during the initial protest, and we see no reason to revise our recommendation.

The request for reconsideration is denied.


for James F. Hinchman
General Counsel

^{3/} The agency also failed to respond to Deknatel's prejudice argument. Deknatel reasserts its prejudice in its response to Atrium's reconsideration request.